YEE CHEE PANG

v.

WONG NAM SANG ENTERPRISE SDN. BHD.

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR CJ (MALAYA)
HASHIM YEOP SANI SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 253 OF 1987]
27 FEBRUARY 1988

CONTRACT: *Sale/Purchase agreement - RM54,000 paid by way of deposit - Balance of purchase price to be paid within 6 months from date of agreement - Default of paying balance of purchase price on due date - Effect - "The deposit shall be absolutely forfeited" and agreement "shall absolutely determine" - Agreed period of 6 months expired and balance of purchase price not settled - Agreement rescinded and deposit forfeited - Time was essence of agreement - Whether vendor entitled to rescind agreement and lawfully forfeited deposit.*

This appeal arose out of a sale/purchase agreement dated 23 June 1981 in respect of premises No. 16 Persiaran Puteh Off Klang Road, Kuala Lumpur between the appellant as the vendor and the respondent as the purchaser for a consideration of RM230,000. The respondent/purchaser had paid a sum of RM54,000 by way of deposit at the time of the execution of the agreement. By Clause 3 of the said agreement, the balance of the purchase price was to be settled within 6 months from the date of the agreement, i.e., on or before 22 December 1981. Clause 3 of the agreement, expressly and clearly provided that the balance of the purchase price "shall be deposited with the solicitors, M/s. Lee Beng Cheng & Co. within six (6) months from the date hereof" in default of which "the deposit shall be absolutely forfeited" and the agreement "shall absolutely determine". Clause 11 of the agreement expressly provides that time shall be the essence of the contract.

The agreed period of 6 months to settle the balance of the purchase price expired on 22 December 1981 and the balance was still not settled. The appellant/vendor then instructed M/s. Lee Beng Cheng & Co. to rescind the said agreement and forfeited the deposit. The respondent/purchaser then filed the suit in the High Court, Kuala Lumpur. At the conclusion of the trial, on the facts as found by the learned Judge, she attributed the delay in the settlement of the balance of the purchase price to the appellant/vendor and his solicitors M/s. Lee Beng Cheng & Co. The learned Judge also held there was no justification on the part of the appellant/vendor to terminate the agreement as he and his solicitors were at fault throughout and that they were the causes of the delay that prevented the respondent from fulfilling their part of the bargain.

The trial Judge then made the following orders against the appellant/vendor:

(1) to return the deposit of RM54,000 with interest at the rate of 8% per annum from 23 June 1981 to date of payment;

(2) to repay all necessary expenses incurred by the respondent in entering into the said sale and purchase agreement.

Hence, this appeal by the appellant/vendor. The crux of the matter was whether the RM54,000 was a true deposit.

Held:

[1] Based on the learned Judge's own pronouncement the cause of the delay could not have been attributed to the appellant. Accordingly, the appellant was perfectly entitled to rescind the agreement.

[2] The sum of RM54,000 was a true deposit and can lawfully be forfeited. The appellant therefore was within his right under the sale and purchase agreement to rescind the agreement and to forfeit the deposit.

[3] The appeal was allowed with costs and the orders made against the appellant set aside and the parties were ordered to bear their own costs in the Court below.

[Appeal allowed with costs. Orders made against appellant set aside.]

Cases referred to:

K. Umar Rajah v. E.L. Magness [1984] 1 CLJ (Rep) 416
Sun Properties Sdn. Bhd. & Ors. v. Happy Shopping Plaza Sdn. Bhd. [1987] CLJ (Rep) 345

Legislation referred to:

National Land Code 1965, s. 340(2)(a)

For the appellant - T. Thomas (C.L. Wong with him); M/s. Skrine & Co.
For the respondent - Cyrus V. Das; M/s. Shook Lin & Bok

JUDGMENT

Hashim Yeop Sani SCJ:

This appeal arose out of a sale and purchase agreement relating to premises No. 16 Persiaran Puteh, Off Klang Road, Kuala Lumpur which agreement was executed on 23 June 1981 between the appellant (first defendant in the Court below) as vendor and the respondent (plaintiff in the Court below) as purchaser for a consideration of RM230,000. At the time of the execution of the said sale and purchase agreement a sum of RM54,000 was paid by the purchaser by way of deposit. Under Clause 3 of the said agreement the balance of the purchase price was to be settled within six months from the date of the agreement, that is, on or before 22 December 1981.

It does not seem to be disputed that several sums of money were paid in instalments towards the purchase price and that by 9 December 1981 there was apparently a balance of RM150,000 of the purchase price yet to be settled.

It is also not disputed that the purchaser had to obtain loans to finance the balance of the purchase price and that the property in question was at the material time subject to a charge. Neither of these facts were however mentioned anywhere in the said agreement. There was as a result a delay in providing the necessary undertaking before the loans could be obtained and when the agreed period of six months expired on 22 December 1981 the balance of the purchase price was still not settled. The appellant then instructed Messrs. Lee Beng Cheang & Co. to rescind the said agreement and forfeited the deposit.

It would appear that the learned trial Judge while accepting that the said agreement provided for the reciprocal obligations of the parties was also of the view that there was a "condition precedent" to the performance of the obligations. *K. Umar Rajah v. E.L. Magness* [1984] 1 CLJ (Rep) 416 was cited. Then the trial Judge proceeded to identify what she thought was the condition precedent in this case. She concluded that there was an implied duty on the part of the appellant to cooperate and not to hinder or obstruct the performance of the agreement. On the facts as found by her the learned Judge attributed the delay in the

settlement of the balance of the purchase price to the appellant and his solicitors, Messrs. Lee Beng Cheang & Co. She also held there was no justification on the part of the appellant to terminate the agreement as he and his solicitors were at fault throughout and that they were the causes of the delay that prevented the respondent from fulfilling their part of the bargain.

The trial Judge then made the following orders against the appellant:

(1) to return the deposit of RM54,000 with interest at the rate of 8% per annum from 23 June 1981 to date of payment.

(2) to repay all necessary expenses incurred by the respondent in entering into the said sale and purchase agreement.

To complete the record it may be mentioned that the suit in the Court below included also one Yong Sai Moi @ Yong Chan Ying (f) as the second defendant, and the Registrar of Titles as the third defendant. The claim against the second defendant was dismissed because the learned Judge found that fraud as envisaged under s. 340(2)(a) of the National Land Code had not been proved. As regards the third defendant the learned Judge awarded costs against him for wrongly removing the caveat without a proper service of Form 19C. There was however no appeal by the third defendant. There was also no cross-appeal by the respondent with regard to the rejection of the allegation of fraud against the second defendant.

It would seem to us that a basic question to be settled first in this appeal is the order in which the obligations of the parties in the said sale and purchase agreement were to be performed. The relevant provisions of the agreement in this regard are Clause 3, 4, 5, 7 and 9.

It needs to be mentioned immediately that Clause 11 of the agreement expressly provides that time shall be the essence of the contract. There was no provision anywhere in the agreement for enabling any extension of time.

Now Clause 3 of the agreement expressly and clearly provides that the balance of the purchase price "shall be deposited with the solicitors, M/s. Lee Beng Cheang & Co. within six (6) months from the date hereof" in default of which "the deposit shall be absolutely forfeited" and the agreement "shall absolutely determine".

Clause 4 of the agreement also provides clearly that the vendor "shall immediately on being notified of such payment" made under Clause 3 execute a valid transfer in favour of the purchaser and deliver the same to the purchaser's solicitors.

Clause 5 provides that Messrs. Lee Beng Cheang shall hold the balance of the purchase price as stakeholders.

Clause 7 of the agreement again clearly provides that vacant possession of the said premises shall only be given to the purchaser within one month from the date the balance of the purchase price being deposited with the said solicitors.

It is quite clear therefore that the so called "condition precedent" as described by the learned trial Judge can never exist on the face of the express and clear provisions of the said clauses of the agreement referred to above. There is no doubt that for the appellant to comply with Clause 4 there must be **actual** deposit of the balance of the purchase price within the time prescribed in the said agreement.

The importance of Clause 3 can also be seen by the provision of Clause 7 whereby the appellant is only obliged to deliver vacant possession of the premises within one month

from the date of the deposit of the balance of the purchase price. This means that the vendor is not obliged under the agreement to deliver vacant possession immediately upon payment of the purchase price. It could well be that the one month's grace period given to the appellant to deliver vacant possession was to enable him to effect the necessary transfer in favour of the purchaser. In *K. Umar Rajah* the condition precedent was not only expressed but conceded by appellant's Counsel; (p. 419).

Looking at the facts it would seem to us quite clear that the real cause of the delay was the time taken in the exchange of correspondence between M/s. Lee Beng Cheang & Co. and the solicitors of the finance company, Malayan United Finance Bhd. The finance company had in fact approved the loan on 29 August 1981 subject to a number of conditions which are the usual conditions where there is an existing charge on the property.

In our view since M/s. Lee Beng Cheang & Co. was the common solicitor of both the appellant and the respondent at the material time and who drafted the said sale and purchase agreement for the parties it would have been a very simple process of giving the usual solicitors' undertaking and to have the relevant documents prepared to enable the release of the money from the finance company.

The learned trial Judge would appear to have accepted the fact that M/s. Lee Beng Cheang & Co. should have acted promptly having regard to the limited period provided by the said agreement. In her grounds of judgment (at p. 30) the learned Judge said:

> Under these circumstances, one would have expected the solicitors to act with speed as the completion date was drawing near and that they were fully aware that MUI was willing to release the redemption sum.

Based on her own pronouncement the cause of the delay could not have been attributed to the appellant. Accordingly we are of the view that the appellant was perfectly entitled to rescind the agreement.

As regards the forfeiture of the deposit of RM54,000 we have to look at the provision of the agreement in the matter of forfeiture of the deposit. Clause 1 of the agreement described the RM54,000 as a payment "by way of deposit for the due performance by the purchaser of the several terms hereinafter contained." Clause 3 of the agreement provides that the balance of the purchase price shall be deposited with the common solicitor within a specified period and in default of which the deposit "shall be absolutely forfeited to the vendor" and the agreement shall absolutely determine and of no further force or effect.

The crux of the matter is whether the RM54,000 is a true deposit. If it is a true deposit or earnest money (the two terms being interchangeable) then the sum can lawfully be forfeited by the appellant - see also *Sun Properties Sdn. Bhd. & Ors. v. Happy Shopping Plaza Sdn. Bhd.* [1987] CLJ (Rep) 345. Here the intentions of the parties as to what happens to the deposit are clearly expressed in the agreement. In our view the RM54,000 is a true deposit and can lawfully be forfeited.

In conclusion we hold that the appellant was within his right under the sale and purchase agreement to rescind the agreement and to forfeit the deposit. We accordingly allow the appeal with costs and set aside the orders made against the appellant. Parties shall bear their own costs in the Court below.

Deposit to be refunded to the appellant.

Also found at [1988] 1 CLJ 287